



control over claimant while he was driving a truck owned by Jared Engelbrecht, d/b/a JC Trucking (JC Trucking) and hauling trailers owned by Trinity. Rather, Trinity believes claimant was an employee of JC Trucking.

JC Trucking argues that the ALJ was correct in finding claimant was an employee of Trinity. JC Trucking claims that Trinity exercised control over claimant while he was driving the truck, which was leased exclusively to Trinity for the sole purpose of hauling Trinity's trailers.

Regardless of claimant's employment status, both Trinity and JC Trucking argue that the claimant failed to establish he sustained an accidental injury that arose out of and in the course of his employment or that he provided timely notice of his injury. Both respondents further contend that the evidence produced at the preliminary hearing indicates neither respondent has sufficient payroll so as to find coverage under the Act.

Claimant argues the ALJ's Order should be affirmed in all respects.

The issues to be determined are as follows:

1. Was claimant an employee of either Trinity or JC Trucking on June 23, 2004?
2. If claimant is an employee of either respondent, is the Act implicated based upon that respondent's payroll?
3. If the answer to issues 1 and 2 are in the affirmative, did claimant suffer an accidental injury arising out of his employment with that respondent on June 23, 2004?
4. If the answer to issue no. 3 is in the affirmative, did claimant provide notice as required by K.S.A. 44-520?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

JC Trucking is a sole proprietorship owned by Jerad and Elizabeth Engelbrecht. In October 2003, the two purchased a 1981 Peterbilt truck and had it rebuilt. It was their intention to make the truck available to Ms. Engelbrecht's brother, Jon Mies, so he could use it to pull large trailers. The truck was placed into service in April 2004. Through a common acquaintance, Jerad Engelbrecht contacted William (Bill) Schmitz, the owner of Trinity, about leasing the truck to Trinity and providing a driver to haul the trailers owned by Trinity. Apparently Trinity's business is securing contracts to haul crops and feed from one place to another. Trinity provides the trailers, but independently leases the trucks and the drivers used to haul the crops and grain.

Jerad Engelbrecht, d/b/a JC Trucking, entered into a contract with Trinity, leasing the truck and a driver, Jon Mies, to Trinity. JC Trucking and the driver would receive a percentage of the loads that were transported. Neither JC Trucking nor Trinity had workers compensation coverage for this arrangement, although the agreement between these two entities specifically provided that JC Trucking would provide the workers compensation insurance and deduct all the appropriate taxes from the employee's pay. This agreement also indicated that JC Trucking would provide a driver for the truck and that Trinity had certain rights to approve the driver supplied by JC Trucking.

After a short period of time, Jon Mies indicated he no longer wished to drive the truck. Further, the Engelbrechts realized they were not making any money and needed to sell the truck. While waiting for the truck to sell, Jared Engelbrecht was contacted by the claimant who indicated he'd been told by Bill Schmitz that JC Trucking needed a driver. According to Bill Schmitz, he was familiar with claimant as he had worked for Trinity before.

Claimant spoke with Jared Engelbrecht and the two agreed he would drive the truck on a dedicated run from Kansas to Oklahoma which JC Trucking did for Trinity. Claimant went to Bill Schmitz's house and filled out some paperwork. At Trinity's direction and expense, a drug screen was performed and a background check was completed. These items were necessary to meet federal regulations. JC Trucking agreed to pay claimant 28 percent of what JC Trucking received for each of the loads claimant hauled.

Claimant began working in mid May 2004 and continued until June 23, 2004. Claimant would routinely call Trinity and confirm that a load was required. He would go pick up the truck at JC Trucking, take it to Trinity, pick up the trailer and then proceed to Wichita where he would retrieve feed and deliver it to Oklahoma where he would empty the trailer. The process of emptying the trailer required the use of permanently mounted vibrators within the hoppers. According to claimant, the vibrators could not completely clear the hopper. Claimant testified he would have to use a mallet on a daily basis to knock the sides of the hopper on the trailer in order to completely empty the container. Claimant obtained this rubber mallet from Bill Schmitz's son, but it broke after a week. He later obtained another mallet or hammer at the farm where he was delivering the grain.

Claimant testified that as he would swing the mallet, he began to notice problems in his neck and arm. He testified he told both Jerad Engelbrecht and Bill Schmitz about his complaints, and asked them to install more vibrators to make his job easier. His pain and complaints continued until June 23, 2004 when claimant advised Mr. Engelbrecht that he was no longer willing to do the job. Claimant also says he told both Mr. Engelbrecht and Renee, a Trinity employee, that he was going to see a doctor. Claimant's message to Jared Engelbrecht was conveyed in a telephone call and was recorded.

The telephone call indicates claimant was frustrated with the "bull shit" and "kindergarten tactics" demonstrated by Bill Schmitz. Claimant indicated Mr. Schmitz was calling each morning, asking where claimant was, asking what he was doing, and that

claimant no longer wished to deal with him. Claimant assured Jared that he would deliver the weekly load but that would be his last work for the week. This conversation mentions nothing about an injury although, claimant adamantly maintains he repeatedly told Bill Schmitz and Jared Engelbrecht of his right arm complaints. He indicated they merely told him to use his private insurance.

According to claimant, he learned that JC Trucking was going to sell its truck so claimant knew he would be out of a job. On June 21, 2004, he applied for a job with Mies & Sons Trucking Inc. and had another Department of Transportation physical for that employer on June 24, 2004. That physical revealed no impairments or injuries.

Then on June 25, 2004, claimant sought treatment with his personal physician complaining of right arm pain which he attributed to swinging the mallet while working. Claimant never went to work for Mies & Sons Trucking as he believed he would be unable to climb up and down the trailer frequently.

The information provided to the ALJ indicates claimant received just over \$5,000 (gross) from JC Trucking working just over 5 weeks. State and federal taxes were deducted from these checks. JC Trucking paid Jon Mies \$1,629.06 (gross) during the short period he was driving the truck.

Trinity's paperwork shows it has only one declared employee, that being Bill Schmitz's wife. Bill Schmitz, Jared Engelbrecht and two other individuals are represented as subcontractors. The total payments to these subcontractors for the period January 1 through August 10, 2004 was \$242,712.79. The payments to Jared Engelbrecht totalled \$20,732.66.

Based upon this collection of facts, the ALJ concluded claimant was the employee of Trinity and that Trinity had sufficient payroll to meet the requirements of the Act. He further concluded claimant had established that he suffered an accidental injury arising out of and in the course of his employment with Trinity. Thus, Trinity was responsible for the benefits sought.

In spite of Trinity's efforts and protestations to the contrary, the Board agrees with the ALJ's conclusion that claimant was an employee of Trinity. The uncontroverted testimony was that Trinity arranged for claimant to seek out JC Trucking for the purpose of driving the dedicated route from Kansas to Oklahoma and back. Trinity paid for the drug screen and background check. Trinity had final approval on all the drivers supplied by JC Trucking. Jared Engelbrecht testified that he "never really knew where the truck was going

or what they were hauling.”<sup>3</sup> According to him, claimant looked to Bill Schmitz for direction.<sup>4</sup>

Trinity routinely arranged for the dedicated loads to which claimant was assigned. Each morning claimant would contact Bill Schmitz, owner of Trinity. The two would work out the schedule and claimant would follow through. The two men had some sort of personality conflict, possibly owing to claimant’s alleged shoulder and neck injury, although that evidence is less than clear. In any event, this relationship terminated on June 23, 2004, claimant’s last day working as a driver hauling Trinity’s trailers.

While it is true that JC Trucking withheld monies from claimant’s paychecks and that fact certainly suggests an employment relationship, that does not foreclose a finding that Trinity was the employer. The primary test utilized in Kansas to determine whether an employee/employer relationship exists is whether the employer has the right of control and supervision of the work of the employee. This involves the right to direct the manner in which the work is performed as well as the result which is to be accomplished. It is not the actual exercise of control, but the right to control which is determinative.<sup>5</sup> These facts, at least so far as the record is presently developed, are supportive of the ALJ’s conclusion. Thus, the ALJ’s finding that claimant was an employee of Trinity is affirmed.

In addition to establishing the employer/employee relationship, it is also claimant’s burden to prove coverage under the Act, and also includes whether respondent has the requisite payroll requirements as set forth in the Act.<sup>6</sup> K.S.A. 44-505(a)(2) exempts from application of the Kansas Workers Compensation Act the following:

(2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, **except that no wages paid to an employee who is a member of the employer’s family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;** (Emphasis added)

Thus, in order to avoid being subject to the provisions of the Kansas Workers Compensation Act, the above statute establishes a two-prong test. First, the employer

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<sup>3</sup> Engelbrecht Depo. at 28.

<sup>4</sup> *Id.*

<sup>5</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994); *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991); and *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

<sup>6</sup> *Brooks v. Lochner Builders, Inc.*, 5 Kan. App. 2d 152, 613 P.2d 389 (1980).

must not have had an annual payroll for the preceding calendar year greater than \$20,000. Secondly, the employer must reasonably estimate that it will not have a gross annual payroll for the current calendar year of more than \$20,000 for all employees excluding family members.<sup>7</sup>

In this instance, the only financial information relative to Trinity covers the first 7-1/2 months of 2004. The difficulty here is that the statute requires the \$20,000 be paid to *employees* and statutorily family member's pay cannot be considered.

Here, the owner and his son account for two of the four subcontractors receiving monies from Trinity. The owner's wife is the company's secretary. Because of that familial relationship, any monies paid to them are excluded from the threshold consideration regardless of whether they are employees or statutory employees. Thus, we must look to the other two individuals' pay to see if the statutory threshold has been met.

The remaining two payees, Jared Engelbrecht and Tony Orth, are designated as independent contractors. The Board finds that it can properly consider the payments to these subcontractors when considering the statutory payroll threshold. The phrase "all employees" as it is used in K.S.A. 44-505 must be construed to include subcontractors as in this instance. Otherwise, companies such as Trinity could avoid liability to such statutory employees by merely contracting with truck owners and/or drivers, declaring them independent contractors, and arguing, as Trinity does here, that it has no employees and an insufficient payroll upon which to base jurisdiction of the Act. Such an arrangement subverts the provisions of K.S.A. 44-503, which is to prevent employers from evading liability under the act by contracting with outsiders to do work which they have undertaken to do as part of their trade or business.<sup>8</sup> Trinity's business is to haul crops and grains from one place to another and inherent in that business is the means to get the trailer to its destination. Thus, the Board finds it is appropriate to consider the payments to the two non-familial subcontractors.

The Board does, however, have difficulty with the sufficiency of the evidence offered on this issue. The amounts paid to Jared Engelbrecht and Tony Orth reflect gross amounts. There is no evidence relating to Tony Orth and how much he or other drivers through him earned in wages during the period reflected in the documents provided. It may be that he was actually paid all the monies as wages which are reflected on the exhibit and if so, then the threshold would be met. Yet, given the present state of the record, there is no evidence that would justify that conclusion.

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<sup>7</sup> *Fetzer v. Boling*, 19 Kan App. 2d 264, 867 P.2d 1067 (1994).

<sup>8</sup> *Rodriguez v. John Russell Constr.*, 16 Kan. App.2d 269, 826 P.2d 515 (1991).

It is clear, however, that in the case of Jared Engelbrecht and the payments made to him as the owner of a truck used for hauling for Trinity, claimant earned just over \$5,000 in the five weeks of his period of employment. The first driver for JC Trucking earned just over \$1,600 in wages. The balance of the \$20,000 monies paid to Jared Engelbrecht, approximately \$15,000, presumably went to expenses associated with the truck. The Board finds that it is inappropriate to consider the gross amount of payments made to Jared Engelbrecht as it includes expenses and overhead associated with the ownership of the truck. Only the actual wages paid to the drivers or for labor should be considered in this determination. Based upon the evidence presented in this matter, the Board finds claimant has failed to sustain its burden of proof that Trinity's payroll to employees and/or subcontractors meets the statutory threshold of \$20,000 for the past year or the current year. Accordingly, the ALJ's preliminary hearing Order must be reversed.

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated August 24, 2004, is affirmed in part, and reversed in part and the preliminary hearing Order is hereby set aside.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2004.

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BOARD MEMBER

c: David M. Bryan, Attorney for Claimant  
Timothy A. Emerson, Attorney for Respondent Trinity Trucking, Inc.  
Gary K. Jones, Attorney for Respondent JC Trucking  
James Roth, Attorney for the Fund  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director